

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 99-254

January 11, 2000

NORTHERN UTILITIES, INC.
Petition for Waivers From
Chapter 820

ORDER ON PHCCM's
MOTION FOR ACCESS
TO INFORMATION
DESIGNATED AS
CONFIDENTIAL AND
TEMPORARY PROTECTIVE
ORDER NO. 1, AMENDED

I. SUMMARY

On December 17, 1999, the Plumbing, Heating and Cooling Contractors of Maine (PHCCM) filed a Motion for Access to Information Designated as Confidential. The Public Advocate filed a statement in support of this motion on January 3, 2000 and Northern Utilities, Inc. (Northern) filed an opposition to the PHCCM's motion on January 4, 2000.

For the reasons discussed below, the Temporary Protective Order is amended to allow Mr. Bradley, as counsel to PHCCM access, to designated confidential information under certain conditions

II. TEMPORARY PROTECTIVE ORDER NO. 1

Temporary Protective Order No. 1 protects the following information:

1. Revenues and profits from Northern's potential non-core activities;
2. The number of customers for certain potential non-core activities and the number of service calls;
3. Northern's assessment of the potential for future growth for certain potential non-core activities; and
4. The assessment of Northern employees of the impact of potential non-core activities on the employees' responsibilities.

In the June 22, 1999 Order on Motion for Protective Order, the Examiner noted that the Temporary Protective Order makes the confidential material available only to the Commission, its staff and consultants and the Public Advocate, and his staff and consultants because at the time the order was issued the Public Advocate was the only intervenor. The Examiner further noted that if there are other parties added to the case

and these parties seek access to the protected material, section 1311-A (1)(D) of Title 35-A would come into play.

III. PHCCM'S MOTION AND NORTHERN'S OPPOSITION

PHCCM asserts that it needs access to information which has been designated confidential so that it can demonstrate "the harm its members will suffer" if Northern's waiver request is granted. PHCCM asserts that section 1311-A of Title 35-A requires the Commission to permit PHCCM's counsel and consultants access to designated confidential information. PHCCM's counsel has disclosed that he has an interest in an entity that sells heating oil to approximately 1,300 customers in the Portland area. Section 35-A §1311-A(1)(D) of Title 35-A contains an exception to the requirement of access by a party's attorney if the attorney has a "direct, personal and substantial financial interest that could be benefited by access to the information to the determination of the party that provided the information." PHCCM claims this provision is not applicable because the entity that sells heating oil does not provide any of the services at issue in this proceeding.

Northern argues that in determining whether to modify the protective order, the Hearing Examiner must balance Northern's need for non-disclosure of its confidential information against PHCCM's interest in acquiring Northern's confidential information. Northern states that the information would confer a strategic advantage to competitors such as the PHCCM.

III. ANALYSIS

Section 1311-A of Title 35-A sets forth certain requirements for the issuance of protective orders. This section provides, in relevant part:

In granting protective orders, the commission shall balance the need to keep the information confidential with the policies of conducting its proceedings in an open and fair manner where all parties have the right and opportunity to participate effectively as provided under the Maine Administrative Procedure Act, the Maine Rules of Civil Procedure, the Maine Rules of Evidence and the Maine freedom of access laws.

35-A M.R.S.A. § 1311-A (1)(B). The statute also places the burden of demonstrating the need for protection on the party seeking protection. 35-A M.R.S.A. § 1311-A (1)(C). Once the Commission¹ has decided that information at issue should be protected and access to a *party* should be denied, the Commission "shall provide access to the party's attorney, if any, subject only to the restriction that the attorney use the information solely

¹ The presiding officer may issue protective orders for the Commission in accordance with MPUC Rules Chapter 110 § 928.

for the purpose of the proceeding and not disclose the information to others.” 35-A M.R.S.A. § 1311-A (1)(D). This requirement contains the following exceptions:

- (1) The commission may deny an attorney access to information relating to bids if the attorney represents a party that made a competing bid.
- (2) The commission may impose further limitation if the commission finds that an attorney has a direct, personal, and substantial financial interest that could be benefited by access to the information to the detriment of the party that provided the information.

Id. The statute contains an explanation for the provision of only these limited exceptions to provide the material to the attorney of the party to whom access has been denied:

Unless the commission finds that the conditions of subparagraphs 1 or 2 are met, the obligations of attorneys under the ethical rules, including the obligation to decline representation in certain cases, the authority of the commission to discipline attorneys who appear before the commission, including the authority, under section 1502, to punish for contempt persons who fail to comply with a protective order and the commission's ability to recommend sanctions by other bodies, including the discipline of attorneys by the courts and the Board of Overseers of the Bar, is sufficient security to permit the attorney to have access to information in order to represent a party before the commission.

Id.

Based on the above provisions, it is clear that access to a party's attorney may not be denied unless the circumstances outlined above are present or unless, on appeal of the protective order, the Commission finds “that potential for damage resulting from the disclosure of the information in accordance with the protective order clearly exceeds the probative value of the information in the proceeding.” 35-A M.R.S.A. § 1311-A (2)(D).

With regard to the initial balancing, the Examiner has already concluded in Temporary Protective Order No. 1 that certain information should be protected. PHCCM does not argue that this information should not be protected but rather that its attorney and consultant should have access to the information. Thus, the provisions of section 1311-A(1)(D) and (E) apply. Because there is no competing bid at issue in this case, Mr. Bradley's access to the material may be denied or restricted only upon a finding that he has “ a direct, personal and substantial financial interest that could be benefited by access to the information to the detriment of the party that provided the information, 35-A M.R.S.A. § 1311-A(1)(D)(2), or except by the Commission on appeal of this protective order. 35-A M.R.S.A. § 1311-A (2).

Northern argues that Mr. Bradley's interest in Vessel Services, Inc. and Spring Ice and Oil “could be benefited by access to Northern's confidential information

concerning its business strategies, perceptions of the market, and financial information, to the detriment of Northern.” Opposition at 7. Northern states that its witnesses have testified that Northern needs to offer the services at issue in order to persuade customers to choose natural gas instead of oil for their heating needs. Therefore Northern concludes that “companies selling heating oil have a direct financial interest in ensuring that Northern will not be able to continue to offer the services, as customers will be more likely to choose oil as a fuel source over natural gas.” In addition, Northern argues that Spring Ice and Oil could benefit its oil business by entering into the services at issue.

Because Spring Ice and Oil Company does not currently engage in any of the activities at issue in this proceeding, Mr. Bradley could be benefited by access to the designated confidential information only if such information would benefit an oil dealer or if Spring Ice and Oil or some other entity in which Mr. Bradley has a personal, direct, and substantial financial interest enters such business in the future. Northern has not explained how the types of information at issue would benefit an oil dealer that does not offer the services for which Northern seeks a Chapter 820 exemption. Northern’s claim that Spring Ice and Oil will benefit if the waiver is denied does not address the question of whether the designated confidential information will provide a benefit to Spring Ice and Oil to the harm of Northern.

It is possible, however, as argued by Northern, that Spring Ice and Oil might provide such services in the future or that Mr. Bradley might seek to invest in another company that does offer such services. Because that potential does exist, the protective order contains a further restriction, requiring, as a condition of having access to the material, Mr. Bradley to refrain from investing in any venture that offers the same activities at issue in this case for a period of 3 years from the date of this Order. This means that if, within the three-year span, Spring Ice and Oil decided to offer the services at issue in this case, Mr. Bradley would be expected to divest his interest in that company. This restriction is in addition to the restriction set forth in the statute that Mr. Bradley use the information solely for the purpose of the proceeding and not disclose the information to others. As is generally the practice, and as provided for in the amended Temporary Protective Order No. 1, Northern may require Mr. Bradley to sign a protective agreement embodying the requirements of this protective order before releasing designated confidential material to him.

PHCCM also asks that its consultant be provided with access to designated confidential information. Under section 1311-A, the Commission may restrict the disclosure of information under protective order to a party’s independent consultant only for compelling reasons and to the least extent necessary, except the Commission may require that the information be used only for the purposes of the proceeding in which it is disclosed and may prohibit disclosure of the information by the independent consultant to others. 35-A M.R.S.A. § 1311-A(1)(E). Northern does not provide any argument as to why access to PHCCM’s consultant should be denied. In the absence of any compelling reason for restriction (beyond the normal protective order restrictions)

or denial, PHCCM's consultant is permitted access to designated confidential information.

Although not strictly part of the analysis for issuing the Amended Protective Order, the following analysis may be helpful in the event that this amended protective order is appealed. First, if the Examiner had engaged in a weighing process to determine whether PHCCM's attorney could have access to the designated confidential information, the Examiner would have determined what factors, if any, increase the risk of damage from releasing the material to the party's attorney beyond those factors set forth in the statute. The reason for engaging in this analysis is that section 1311-A(1)(D) outlines the reasons why revealing the information to attorneys, except in two specifically-delineated situations, poses a very small risk of damage to the party that is providing the information.² If there are no additional factors and the information will likely help the party seeking the information to make its case, the attorney for that party should have access to the information. If the information is not likely to lead to probative information, then release of the information even to the attorney would not be justified.

Given this approach, the Examiner would arrive at the following conclusions. Because Northern seeks a waiver to perform activities that may be determined to be non-core activities without complying with the requirements of Chapter 820, PHCCM, which competes with Northern in offering such services, should have the chance to show how it may be harmed by such a waiver. This is especially true in view of the recent amendment to 35-A M.R.S.A. § 713, which clarifies that the term "undue competitive advantage" for the purposes of section 713 "means an advantage gained by a violation of the requirements established by the commission by rule pursuant to section 715. " 35-A M.R.S.A. § 713. Thus the Commission's obligation to attempt to ensure that the utility or the affiliated interest does not have an unfair advantage in any competitive market as a result of its regulated status or its affiliation with a regulated utility must be examined within the context of whether the utility is in compliance with Chapter 820 of the Commission Rules. If, as here, a utility requests a waiver from Chapter 820, a competitor should be given a full opportunity to show how it may be harmed by the granting of a waiver. Thus, it should have access to information, such as profits or revenues from the activities for which Northern seeks a waiver, so that it can

² In Docket Nos. 99-739 and 99-477, the Commission determined, in what essentially was an appeal of a protective order, that releasing information relating to the terms of sale of the rights of way would pose a risk of harm to CMP and its gas affiliate in future negotiations for similar arrangements. In determining that the information should not be disclosed even to the attorneys of competitors, the Commission found that there were unique circumstances present in that case. *Central Maine Power Company and CMP Natural Gas, L.L.C., Application for Approval of Affiliated Interest Transaction*, Docket No. 99-739, Order Part II at 5. (January 3, 2000). The Examiner interprets this as a finding of unique circumstances that pose an additional risk of harm beyond those outlined in section 1311-A (1)(D).

determine the extent to which ratepayers may be subsidizing such activities.³

With regard to other material that is protected at this time, the Examiner would ask Northern to demonstrate additional risks inherent in providing the information to PHCCM's attorney and consultant and would ask PHCCM to demonstrate how this information would help it to make its case against granting the Chapter 820 waiver.

Accordingly, it is

ORDERED

1. That until further order, confidential and proprietary information to be produced by Northern relating to or discussing:
 - (a) revenues and profits from Northern's non-core activities;
 - (b) the number of customers for certain potential non-core customers and the number of service calls;
 - (c) Northern's assessment of the potential for future growth for certain potential non-core activities;
 - (d) The assessment of Northern employees of the impact of non-core activities on the employees' responsibilities.

shall be considered "Designated Confidential Information" for purposes of this Temporary Order and access to and use of Designated Confidential Information shall be limited as described in Paragraph 4 below.

2. That until further order, all Designated Confidential Information be and remain confidential. Designated Confidential Information shall not be disclosed for any purpose other than the purposes of this proceeding, and then solely in accordance with this Temporary Order. No person to whom access to Designated Confidential Information is accorded pursuant to paragraph 3 of this Temporary Order shall: disclose or reveal, directly or indirectly, the content of the Designated Confidential Information to others, except as provided in paragraph 3.

³ Northern argues that profitability is outside the scope of the proceeding based on the Examiner's earlier order in which she stated that projections of profitability, for the purpose of establishing that ratepayers would not be harmed by the granting of a waiver would not be expected to be a basis for granting a waiver. However, the question of cross-subsidization is being raised by PHCCM for the purpose of showing that its members would be harmed by the granting of a waiver.

3. That until further order, access to Confidential Information shall be limited to (i) Commission members and counsel; (ii) the Public Advocate and counsel; (iii) counsel, employees, independent consultants or experts retained by the Commission (including both advisory and advocacy staff) or the Public Advocate in connection with this proceeding; (iv) **counsel for the Plumbing Heating and Cooling contractors of Maine (PHCCM), provided that the attorney representing PHCCM as of the date of this Order refrains for a period of three years from the date of this Order from investing in any entity that provides the types of services at issue in this proceeding; (v) independent consultants or experts of PHCCM;** a stenographer or reporter recording any hearing in connection with this proceeding; and (vi) counsel for, or any other representative of Northern. Further, that all parties, **and representatives of parties** that are provided access to Confidential Information may not use the information for any purpose other than the consideration of issues in this proceeding.
4. That all materials claimed by Northern to be Designated Confidential Information under the terms of this Temporary order shall be clearly marked "Confidential" by Northern. In the case of documents, each page of any such document shall be stamped "Confidential" in bold lettering in the upper right hand corner of each page including the cover letter. Any document or portion thereof not clearly and conspicuously marked "Confidential" in bold lettering shall not be protected under the terms of this Temporary Order. Faxed materials should be marked as any other document. With regard to other media, diskettes should be marked "Confidential" on the outside and, to the extent possible, each file on the diskette should be similarly identified. Any person or party subject to the terms of this Temporary Order who receives unmarked documents or materials which he/she believes Northern intended to be protected by the terms of this Temporary Order, and that would have been protected if marked in accordance with this paragraph, shall make a good faith effort to notify Northern of this fact and to avoid use of such documents or materials in a manner inconsistent with protection of such material under this Temporary Order.
5. That no copies of Designated Confidential Information furnished by Northern shall be circulated to persons other than those persons who are authorized under Paragraph 3 of this Temporary order to obtain Designated Confidential Information. Documents offered in evidence may be copied as necessary for that purpose. Persons authorized under Paragraph 3 hereof also may take such notes as may be necessary solely for the purposes of this proceeding. Those notes shall also be treated as Designated Confidential Information.
6. That the restrictions upon, and obligations accruing to, persons who become subject to this Temporary Order shall not apply to any Designated Confidential Information submitted in accordance with Paragraph 1 of this Temporary Order if the Commission rules, after reasonable notice and hearing, that the Designated

Confidential Information was publicly known at the time it was furnished or has since become publicly known through no fault of the receiving party.

7. That where reference to Designated Confidential Information is required in pleadings, briefs, other legal documents, or argument, that reference shall be by citation of title or exhibit number only or by some other non-confidential description to the extent possible. In those circumstances, counsel shall make every reasonable effort to preserve the confidentiality of material in the sealed record. If counsel shall include Designated Confidential Information in pleadings, briefs, other legal documents, or arguments, that portion of the documents or that portion of the transcript of the argument containing Designated Confidential Information shall be maintained under seal.
8. That the Commission may draw upon all Designated Confidential Information in the record in the deliberation of any decision or order that it may issue, but the Commission will avoid the reproduction in its decision of any Designated Confidential Information.
9. That should any appeal of, or other challenge to, the Commission's decision in this proceeding be taken, any portions of the record that have been sealed in accordance with Paragraph 13 shall be forwarded to the courts of this State in accordance with applicable law and procedures, but under seal and so designated in writing for the information of the court.
10. That this Temporary Order does not preclude any party from (a) objecting under the Maine Rules of Evidence to the admissibility of any Designated Confidential Information produced by Northern or (b) objecting, on any substantive or procedural ground, to any subsequent data request or other request for information.
11. That Northern may, at its option, provide to each person (other than the Commissioners or Commission Staff) having access to Designated Confidential Information a copy of this Temporary Order and require each person to agree in writing to the terms hereof prior to obtaining access to the Designated Confidential Information.
12. That Designated Confidential Information furnished by Northern pursuant to this Temporary Order and made part of the record in any proceeding before the Commission shall remain in the possession of the Commission, under seal, and subject to the protective requirements of this Temporary Order, until this Commission or its authorized presiding officer shall otherwise order.
13. Copies of Designated Confidential Business Information and documents, notes and other materials containing or reflecting, directly or indirectly, the Designated Confidential Business Information, that are in the possession of Commission

members, counsel or employees (including both advisory and advocacy staffs) of the Commission may be retained by those persons for the purpose of performing those persons' duties and obligations. If retained, the Designated Confidential Information shall be subject to this Protective Order or to a protective order issued in another proceeding in which the Designated Confidential Information is used. If a Commission member, counsel or employee of the Commission does not retain the Designated Confidential Information, that person shall destroy it as provided in this paragraph. Within 40 days after the Commission reaches a final decision (i.e., unappealable) in this proceeding, each other party and Commission independent consultants and experts retained by the Commission to whom Designated Confidential Business Information has been made available shall destroy all documents, notes and other materials containing or reflecting, directly or indirectly, the Designated Confidential Business Information. Audio, video or other such magnetically recorded materials shall be electronically erased before disposal. Documents shall be shredded.

Dated at Augusta, Maine, this 11th day of January, 2000.

BY ORDER OF THE HEARING EXAMINER

Lisa C. Fink